

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA DAMIC,

Plaintiff-Appellant,

v

JUDY DUPUIS,

Defendant-Appellee.

UNPUBLISHED
February 25, 2003

No. 238158
Saginaw Circuit Court
LC No. 00-035665-NO

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was invited to defendant's home for a picnic. At approximately 11:00 p.m. plaintiff was pushing several persons on a homemade swing. The swing consisted of a round tubular frame to which were bolted boards that served as a seating surface. The swing was suspended from a metal crossbeam by chains. As the swing returned to plaintiff a ring on the middle finger of her right hand became caught on some part of the swing and she was pulled to the ground. The force of the pull tore the skin from plaintiff's finger. Efforts to repair the finger were unsuccessful, and ultimately plaintiff lost the finger to amputation.

Plaintiff filed suit alleging that the swing constituted an unreasonably dangerous condition on the property, and that defendant breached her duty to make the premises reasonably safe and to warn of the unsafe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that she had no liability because plaintiff was on the premises as a licensee rather than an invitee, and because the condition was open and obvious. The trial court found defendant's arguments persuasive and granted her motion, concluding that the evidence did not create an issue of fact as to whether defendant breached a duty to plaintiff.¹

¹ The trial court did not specify the rule under which it granted defendant's motion for summary disposition. However, defendant's motion and plaintiff's response were supported by deposition testimony and other documentary evidence. It is logical to assume that the trial court granted the motion pursuant to MCR 2.116(C)(10).

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A prima facie case of negligence may be based on legitimate inferences, provided that sufficient evidence is produced to take the inferences "out of the realm of conjecture." *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

A social guest is a licensee. A landowner owes a licensee a duty to warn of dangerous conditions on the land of which the owner knows or has reason to know if the licensee does not know or have reason to know of the conditions. A landowner does not owe a licensee a duty to inspect the premises or to make the premises safe for the licensee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 612; 537 NW2d 185 (1995). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). A possessor of land has no duty to take steps to safeguard a licensee from an open and obvious danger. *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect against the risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp Inc*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm. Defendant owed plaintiff, a licensee, the duty to warn of hidden dangers on the property of which defendant knew or had reason to know if plaintiff did not know or have reason to know of the dangers. Defendant did not have a duty to inspect the premises or to take affirmative steps to make the premises safe for plaintiff, *Stitt, supra*, and had no duty to safeguard plaintiff from an open and obvious danger. *Pippin, supra*. The construction of the swing with boards, chains, and various fasteners is readily apparent to a casual observer. A reasonable person observing the swing would note that the swing had areas in which a hand or finger could become caught. The fact that plaintiff claims that she did not notice the manner in which the swing was constructed is irrelevant. *Novotney, supra*, 475.

The trial court correctly found that plaintiff did not come forward with sufficient evidence to create a question of fact as to whether the swing presented a dangerous condition that was not open and obvious. Plaintiff admitted that she did not know on what part of the swing her finger became caught. A jury would have been required to engage in impermissible speculation to conclude that plaintiff's finger became caught in a portion of the swing that could not be discovered upon casual inspection. *Ritter, supra*.

Furthermore we find that plaintiff's argument that even if the condition was open and obvious it still presented an unreasonable risk of harm due to the lateness of the hour is without merit. The darkness was not a special aspect of the swing itself. Plaintiff failed to demonstrate the existence of any special aspect that made the swing unreasonably dangerous in spite of its open and obvious nature. *Lugo, supra*.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Helene N. White

/s/ Joel P. Hoekstra